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Date: February 26, 1999

Case Nos.: 1998-LHC-0768, 1998-LHC-0769, 1998-LHC-0770, 1998-LHC-0771

OWCP Nos.: 5-73719, 5-92476, 5-92996, 5-101248

In the Matter of

HERBERT GLAZER,
Claimant,

v.

NEWPORT NEWS SHIPBUILDING
AND DRY DOCK COMPANY,
Employer

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
Party-In-Interest.

Appearances:

Gregory Camden, Esq.
For Claimant

Lawrence Postol, Esq.
For Employer

Howard N. Berliner, Esq.
For the Director

DECISION AND ORDER

This proceeding arises from a claim under the Longshore and Harbor Workers' Compensation Act ("the act"), 33 U.S.C. 901 et seq. Claimant seeks permanent total disability compensation for the period April 9, 1997 to the present and continuing as well as medical benefits under section 7 of the act for psychiatric treatment allegedly made necessary as a result of work-related injuries. Employer (Newport News Shipbuilding and

Dry Dock Company or “the shipyard”) argues that Claimant is limited to a scheduled award pursuant to section 8(f) of the act and that Claimant is not entitled to further medical benefits because his psychiatric illness is not work related. Further, in the alternative, if liable for compensation, Employer seeks partial relief from the special fund pursuant to section 8(f) of the act. The Director opposes such relief.

A formal hearing was held in this case on September 15, 1998 in Newport News, Virginia, at which both parties were afforded a full opportunity to present evidence and argument as provided by law and applicable regulations.¹ The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

STIPULATIONS

At the hearing in this matter, the parties stipulated to the following:

1. That an employer/employee relationship existed at all relevant times;
2. That the parties are subject to the jurisdiction of the act;
3. That Claimant sustained an injury to his left knee arising out of and in the course of his employment on January 18, 1990;
4. That Claimant sustained an injury to his right knee arising out of and in the course of his employment on June 21, 1993;
5. That Claimant sustained an injury to his right knee arising out of and in the course of his employment on May 4, 1994;
6. That Claimant sustained an injury to his knees arising out of and in the course of his employment on January 8, 1997;
7. That a timely notice of injury was given by Claimant to Employer for all of the above injuries;

¹ At the hearing, I admitted all proffered exhibits but one CX 1 through 30, including two post-hearing depositions in advance and EX 1 through 29 and EX 31 were admitted. Ex 30 was withdrawn. After the hearing, Employer submitted a number of additional exhibits (CX 29 A, 30A, 31A, 32, 33, 34, 35, 36 and 37). Without objection, all are admitted (See revised list of Employer's exhibits in ALJ 1).

8. That Claimant filed a timely claim for compensation for all of the above injuries;
9. That Employer filed a timely first report of injury with the Department of Labor and a timely notice of controversion for all of the above injuries;
10. That, at the time of Claimant's January 18, 1990 injury, his average weekly wage was \$565.16, resulting in a compensation rate of \$376.77;
11. That, at the time of Claimant's January 18, 1990 injury, he was paid temporary total and partial disability benefits as demonstrated in a form LS-208 dated August 5, 1998;
12. That Claimant's average weekly wage at the time of his January 8, 1997 injury was \$685.07, resulting in a compensation rate of \$456.72;
13. That Employer has paid Claimant temporary total disability benefits for the January 8, 1997 injury as documented by a form LS-208 dated June 29, 1998;
14. That Employer provided Claimant with medical services as required by 33 U.S.C. 907 (1994);
15. That the current impairment to Claimant's knees, and, thus, any continuing disability, is caused by Claimant's January 18, 1990 injury;
16. That Claimant claims total disability for April 9, 1997 to the present and continuing, as well as care for his psychiatric condition. Employer opposes the claim²; and,
17. That Claimant reached maximum medical improvement by December 9, 1996 at the earliest;
18. That, as a result of his on-the-job injury, Claimant cannot return to his welding job at the shipyard.
19. That Claimant had reached maximum medical improvement by December 9, 1996.

² In a January 8, 1999 letter to me from counsel for Employer (ALJ 1), I was notified that Claimant seeks only temporary disability compensation. However, in his brief dated January 19, 1999 (p. 50), Claimant's counsel again asked for permanent total disability compensation. Thus, I am treating this as a claim for permanent disability. I note that, under stipulation no. 19, the parties agreed that Claimant had reached maximum medical improvement by December 9, 1996 (ALJ 1). As a result, I find that Claimant is permanently disabled.

ISSUES

1. Whether Employer has demonstrated the existence of suitable alternative employment.
2. Whether Glazer has demonstrated that he engaged in a diligent search for work.
3. Whether Glazer is entitled to medical benefits under section 7 of the act for psychiatric treatment.
4. Whether Employer is entitled to partial relief from the special fund pursuant to section 8(f) of the act.

FINDINGS OF FACT

A. Testimony of Claimant, Herbert Glazer

Claimant, Herbert Glazer, testified that he was first employed by the shipyard in May, 1977 as a shopfitter (Tr. 24). Approximately one and a half years later, he became a welder, and he remained one until he was injured in January, 1990 (Tr. 24). As a welder, Glazer was required to crawl, climb, and squat (Id.) He also had to lift materials, some weighing 50 to 100 pounds (Tr. 25).

On January 18, 1990, Glazer suffered an injury to his left knee (Tr. 26). While returning to a welding job, Glazer stepped over a metal jig and caught his left foot (Tr. 26).

³ The following abbreviations are used herein:

JX - Joint exhibits;
CX - Claimant's exhibits;
EX - Employer's exhibits;
ALJ - Administrative Law Judge's exhibit; and
Tr. - Transcript of hearing.

As he came down on his right foot, he twisted his knee severely (Tr. 26). After the injury, Glazer was treated by Dr. Trieshmann, who prescribed therapy, MRIs, X-rays, medication and then reconstructive surgery (Tr. 26). Glazer's first reconstructive surgery took place in May, 1990 (Tr. 26), after which he returned to work as a welder on light duty with work restrictions imposed by Dr. Trieshmann (Tr. 27).

On May 4, 1994, Glazer suffered a new injury when a beam on which he was told to weld broke loose from its tie downs and struck Mr. Glazer's right knee (Tr. 27). he was initially instructed to see Dr. White, but later he was assigned to see Dr. Trieshmann again (Tr. 28). Dr. Trieshmann treated the injury and returned Glazer to work (Tr. 28).

On January 8, 1997, Glazer sustained an additional injury (Tr. 28). As he returned from a metal shack, he stepped down an embankment and fell onto both knees (Tr. 28). Glazer was treated for this latest injury again by Dr. Trieshmann (Tr. 29), who returned Glazer to work on March 3, 1997 under the same permanent restrictions as those previously imposed (Tr. 29).

When Glazer returned to work after his January 8, 1997 injury, Mark Telifson of the shipyard advised Glazer that there was work available for him under Glazer's current restrictions. Glazer then reported to his new supervisor, Sandy Carter (Tr. 29). Carter could not find a job for Glazer, who was passed out (Tr. 29). Glazer then began to keep a record of his attempts to return to work (Tr. 30). Until the end of the year, he continued to call in to the shipyard every five days pursuant to company policy (Tr. 30-1).

Glazer began suffering from depression when he was undergoing surgery (Tr. 31). He experienced personality changes, sadness, fatigue, and anxiety (Tr. 31). Glazer reported these symptoms to Dr. Trieshmann, who prescribed Elavil and Prozac (Tr. 32). During the past year, Glazer also reported his depression to his family physician, Dr. Steven Moore, who treated Glazer and then referred him to a psychiatrist (Tr. 32-3). Glazer's insurance company referred him to Dr. Gingras, who began treating Glazer in April or May of 1998 (Tr. 33). At that time, Glazer suffered from severe panic, anxiety, depression, nervousness, fatigue and numerous problems with his knees (Tr. 33). Glazer began to see Dr. Gingras on a weekly and later a biweekly basis (Tr. 34). He was scheduled to see Dr. Gingras about a month from the date of his testimony (Tr. 34).

Glazer also saw a licensed clinical social worker, Becky McGee, after he began seeing Dr. Gingras (Tr. 34). He sees Ms. McGee on a regular basis (Tr. 34). Glazer is taking Zoloft, Buspar, Tegretol, clomiphene, catapras patch, Trazedone and Desiril (Tr. 35). He has experienced panic attacks in which he feels pressure on his chest and has difficulty breathing (Tr. 35).

Glazer also takes medications for his knee injury, including Tylenol No. 4, Motrin, Flexeril, Restoril and Tylenol gel caps (Tr. 35-6). The pain from his knee and his depression hampers Glazer's ability to work (Tr. 36). Glazer does not believe that his depression is improving (Tr. 36). He hospitalized himself on July 1, 1998 when he

experienced a severe panic attack and could not move. He stayed for approximately three days (Tr. 36-7).

Earlier in 1998, Glazer met with Sandra Delano, who is a vocational rehabilitation expert from the Department of Labor, which had assigned her to assist him (Tr. 37). Delano discussed with Glazer functional testings, ability testings, interest in jobs and medical conditions (Tr. 38). She gave Glazer numerous leads for jobs, including welding engineer, welding technician, and instructor jobs (Tr. 38). However, Glazer was not successful in finding a job (Tr. 39). Delano and Glazer also met with shipyard personnel in an unsuccessful effort to find a job for him there (Tr. 40). Glazer is not presently working with Delano because the time allowed by the Department of Labor has expired (Tr. 39).

Glazer also met with David Karmolinski, Employer's vocational rehabilitation expert, for the first time in July, 1997 (Tr. 40). Karmolinski advised that he was to meet with Glazer for purposes of rehabilitation and for testing (Tr. 40). During the summer of 1998, Karmolinski mailed Glazer job leads and took him to job sites and interviews (Tr. 41). Glazer followed up the leads but did not succeed in finding a job (Tr. 41). Twice before the hearing in this matter, Karmolinski took Glazer out to look for jobs (Tr. 41). They went to an employment agency named ProTemp (Tr. 41). They also went to several possible employers, including a thrift shop and a Disabled American Veterans facility (Tr. 42). Glazer also went out to look for jobs on his own (Tr. 43). He testified that CX 11 contains a log of his job searches, which includes 274 contacts with outside employers and a log of the contacts he made with shipyard personnel in hopes of placement in a light-duty position (Tr. 44; CX 11). CX 23 and CX 31 are updated logs (Tr. 46, 48; CX 23, 31). CX 12 contains notes showing Glazer's follow up on job leads (Tr. 47). Glazer also registered with the Virginia Employment Commission (Tr. 46), which he visited weekly and whose services he used to attempt to find work (Tr. 47; CX 11-12).

Glazer met with Dr. Mansheim, a psychiatrist, at the shipyard's request (Tr. 49). He asked Glazer what he was suffering from and the names of the psychiatrist whom Glazer had visited (Tr. 49).

On cross-examination, Glazer testified that he wears suits to court, church and funerals (Tr. 51). He wore shorts and a t-shirt or slacks to his interviews (Tr. 51). Glazer testified that his former attorney told him to start seeking employment, and he did so (Tr. 53-4). After he failed to find a job and after his second or third meeting with his former attorney, the attorney advised Glazer to look in the want ads (Tr. 55). One job application - for a longshoreman's job - was not accepted because the company cut off applications (Tr. 56). Glazer testified that he was denied the job of inventory counter because it required working on his knees (Tr. 57). He was denied a job as a sales clerk because it required walking and lifting and a job as a carpet salesman for similar reasons (Tr. 58).

Glazer further testified as to several sedentary jobs for which he applied, including one at Hop's Inc. (Tr. 59), Puckett's Welding (Tr. 59), a telemarketer (Tr. 60), and the Omni Hotel (Tr. 60). Glazer applied also to Virginia Maid Kitchens (Tr. 64) and to Carter Iron and Steel (Tr. 66). Carter Iron and Steel did not hire him because it was not an entirely

sedentary job (Tr. 67). Some parts of the job were within his restrictions; others were not (Tr. 68). He also applied to D&M Machine Shop, but it was not hiring (Tr. 68). Glazer also applied to Riddings, which had table work available, but it involved some lifting (Tr. 69-70). He also applied to Liebherr American, which had an opening for table welders, but he was not hired (Tr. 72). Similarly, Advex Corp. had a sit-down job available, but he never heard from them after he applied (Tr. 74).

Glazer reviewed CX 11, 23 and 31 and marked all jobs for which he applied, which had an opening, and which were within his restrictions (Tr. 77-8). Wyle Laboratories and Pressure Washing Systems, Inc. were additional companies that were not on the lists but had openings within Glazer's work restrictions (Tr. 81, 83). Neither company hired him.

With respect to the firms named in CX 31, Glazer applied to Gilliam Welding, which had openings (Tr. 86). He discussed his work restrictions with the company (Tr. 87). He also applied to Children's Hospital (Tr. 89). He tried to apply to Disabled American Veterans, but they would not accept an application from him (Tr. 90). Glazer also looked for jobs at the shipyard, including a job as a welding instructor (Tr. 94). He believed that he could be a bench welder (Tr. 97). He is not sure whether he could do those jobs today (Tr. 99). Glazer also believed that he could work as an arc welding machine operator (Tr. 100). He is not sure whether or not he could do the job now, but he is willing to try (Tr. 101). Glazer believes that his depression is somewhat better than when he was hospitalized in July, 1998, when he was treated by Dr. Gingras (Tr. 102-5). Dr. Gingras and Ms. McGee have encouraged Glazer to continue his job search (Tr. 107).

B. Testimony of Michel Gingras, M.D.

Dr. Gingras is a psychiatrist, who practices in Hampton, Virginia. His curriculum vitae is exhibit 1 to his deposition (CX 29, ex. 1). Dr. Gingras stated that he treated Glazer beginning on May 12, 1998 (CX 29 at 6). Glazer was referred to him by Dr. Steven Moore, Glazer's family physician (CX 29 at 6). During his first meeting with Glazer, Glazer informed Dr. Gingras that he was panicky and fearing that he was going to lose control of his mind (CX 29 at 6).

Glazer associated his problems with the fact that he has had knee problems for several years (CX 29 at 7). He was having difficulty dealing with the fact that he no longer had income and believed that he would no longer be able to support his family (CX 29 at 8). Dr. Gingras believed that the fact that Glazer was no longer receiving his compensation check was a precipitating event. After reviewing that major precipitating problem, Dr. Gingras made a diagnosis of adjustment disorder with mixed feelings, including anxiety, panic, anger, and depression. He added, "secondary to medical condition," meaning that the disorder was related to his medical condition (CX 29 at 9).

On Axis II ⁴ he noted a personality change due to Glazer's medical condition. His way of behaving obviously had changed. On Axis III, there was a knee problem, which has been ongoing for many years. He had undergone numerous operations for and various injections in his knees (CX 29 at 9).

When he stated in his report that the diagnosis of adjustment disorder was secondary to Claimant's medical condition, he meant that the disorder was the result of the fact that Claimant had been having medical problems for a long time and that this was a major stressor. The other stressor was the fact that Glazer's income had been interrupted (CX 29 at 11). Dr. Gingras also noted that Glazer's personality change was due to his medical condition (CX 29 at 11). He noted that Glazer's knee problem was relevant to his analysis of Glazer's Axis III diagnosis (CX 29 at 11). This is important because Glazer had been having knee problems for many years and has had to deal with a great deal of pain. The impact of those experiences on his level of functioning cannot be ignored (CX 29 at 13).

Dr. Gingras noted that, after he examined Glazer, Glazer was hospitalized. Glazer reported that he had taken "one Xanax too many," which was a medication that he used to help him relax (CX 29 at 15). When he returned to Dr. Gingras' office on June 11, 1998, Dr. Gingras noted that Glazer felt guilty and angry over his physical limitations. The pain in his knees was causing him to have difficulty in functioning the way he wanted to (CX 29 at 17). Dr. Gingras' June 11 note records an assessment that Glazer's psychological problems were associated with his medical problems (CX 29 at 17).

Dr. Gingras filled out a mental residual functional capacity form for Glazer (CX 8-1; CX 29 at 18). He noted on that form that Glazer is markedly limited in many areas. He explained that "markedly limited" means that he is experiencing interference in his ability to do certain things (CX 29 at 21). On that form, there is a category "B," which is "sustained concentration and persistence." In this category, Dr. Gingras noted that Glazer is "markedly limited" in his ability to carry out detailed instructions (CX 29 at 19). As Dr. Gingras explained, Glazer is "so overwhelmed and preoccupied with this anxiety and fear that he's feeling guilty and this fear he's not going to make it, that it almost becomes like an obsession. And when it comes time for concentrating on something, he's obviously thinking about something else a lot of times" (CX 29 at 19). Dr. Gingras also noted on that form that, for the same reason, Glazer is markedly limited in his ability to maintain attention and concentration for extended periods. Under section 11 of category B, he further noted that Glazer is markedly limited, which means that he has difficulty 1) completing a normal work day and work week without interruptions from psychologically based symptoms and 2) performing at a constant pace without an unreasonable number and length of rest periods (CX 29 at 20). Again, this was due to his emotional disturbances and continuous preoccupation. As Dr. Gingras described it, Glazer is "almost continuously in panic" (CX 29 at 20). Under category D, Dr. Gingras noted that Glazer's ability to respond

⁴ Axes are aspects of psychiatric diagnoses. For an explanation for each axis see CX 30 at 6 ff.

appropriately to changes in his work setting is also markedly limited due to the fact that he is so unfocused that he is unable to think about what he is doing (CX 29 at 20).

Dr. Gingras also included a hand-written note on the form, which stated as follows: "Patient involuntarily undergoing severe stress with a diagnosis as following: Anxiety disorder related to medical problem and stress from financial situation and work environment" (CX 29 at 22). As for the last hand-written note, which states, "Continued counseling and medication," Dr. Gingras testified that Glazer was taking 100 milligrams of Zoloft, an antidepressive medication, twice a day, as was prescribed by the hospital, and which he refilled for Glazer (CX 29 at 23, 25). He also testified that Glazer is taking five milligrams of Buspar twice a day. He is also using Catapres TTS patches, which is a hypertension medication (CX 29 at 24). He also takes Klonopin at one milligram, four times a day. This medication is a minor tranquilizer, which is the equivalent of Xanax, to help the patient with anxiety (CX 29 at 24). Further, Glazer is taking Tegretol, an anti-epilepsy drug, at 200 milligrams three times a day (CX 29 at 24). Tegretol is basically for people who have psychomotor seizures. Although Gingras is not certain what it does for Glazer, Gingras continued to order refills of this prescription (CX 29 at 24). Glazer also takes 50 milligrams of Trazodone, three tablets at bedtime for sleeping problems (CX 29 at 25).

Dr. Gingras continued to see Glazer about once a month. The last time he saw Glazer was on November 9, 1998 (CX 29 at 25). At that time, Dr. Gingras noted that Glazer was "functioning poorly, reporting that he has not been able to accomplish anything after this past month except for helping his wife around the house with chores; otherwise, he feels that he cannot accomplish any more even though he has tried many times to shop for a job" (CX 29 at 26). At that time, Dr. Gingras believed that Glazer's condition had not improved (CX 29 at 26).

Dr. Gingras confirmed that the limitations set forth in his previous mental residual functional capacity evaluation remained in effect at the time of his deposition (CX 29 at 27). He stated also that he did not agree with all of what was included in Dr. Mansheim's report. He does not agree with Dr. Mansheim's diagnosis of "major depressive disorder, recurrent moderate and impulse control disorder" (CX 29 at 29). He also disagreed with Dr. Mansheim's placing Glazer at 80 on a scale of 1-100 insofar as his ability to function is concerned. As Dr. Gingras explained, the DSM IV shows that a score of 81 to 100 means that the "guy is fine. This is pretty much like you and me" (CX 29 at 31). Dr. Gingras, on the other hand, is of the opinion that Glazer would fall within the 41 to 60 bracket, which indicates a degree of impairment (CX 29 at 32). The difference between Dr. Mansheim's assignment of a score of 80 and Dr. Gingras' score of 41 to 60 is Dr. Gingras' recognition that there is a continuous interference in the way that Glazer can function under demands and organized situations involving stress. Under those circumstances, it would be impossible for Glazer to meet the requirement of the job (CX 29 at 32).

Dr. Gingras also stated that he disagrees with Dr. Mansheim's opinion that Glazer's psychological problems and subsequent treatment are not related to his work injury (CX

29 at 34). As he explained, there is a relationship between Glazer's work injury and his psychological problems because he went through eleven years of having medical problems that continuously interfered with his work or caused him pain. Dr. Gingras does not believe that anyone can claim that Glazer's medical problems were not interfering with his emotional stability, his capacity to enjoy life, his capacity to be productive or his capacity to function (CX 29 at 35).

Dr. Gingras explained that a panic attack is experienced when a person fears that he is going to lose his mind (CX 29 at 35). The person feels a change in body function, including a rapid heart beat, hyperventilation, and a perception that there is something wrong with his body functions (CX 29 at 35). There is a fear of losing control (CX 29 at 35). Although Dr. Gingras has not witnessed one of Glazer's panic attacks, he has noted that Glazer is "pretty anxious" when he come to Dr. Gingras' office (CX 29 at 36).

Like Dr. Mansheim, Dr. Gingras believes that employment would be good for Glazer from a psychological standpoint (CX 29 at 37). However, the employment would have to be in a predictable environment (CX 29 at 38) that would have to be structured and organized (CX 29 at 39). He noted that, if the employer were not flexible, Glazer would sometimes have a difficult time adjusting (CX 29 at 46). For instance, if Glazer were placed in a position where he had to deal with rude or difficult customers or clients, he would be likely to overreact to certain things (CX 29 at 47). Likewise, if he were being chastised by his boss, he would likely go into a state of panic (CX 29 at 47). Dr. Gingras stated that Glazer can try to work at these jobs, but he is not sure that Glazer can be successful at them (CX 29 at 69). He also indicated that part of Glazer's problem is that he can no longer do the job that he was doing before the knee injuries. The loss of his ability to do that job has caused him to lose self esteem (CX 29 at 69).

C. Testimony of Paul Mansheim, M.D.

Dr. Mansheim is a psychiatrist about 50% of whose practice is child psychology (CX 30 at 3-4). In the last two years, Dr. Mansheim has done 24 examinations on behalf of employers (CX 30 at 4). Of those 24, in only one or two has he has determined that the worker's mental or psychiatric problems were a result of a work injury (CX 30 at 4).

Dr. Mansheim was retained by shipyard counsel to do an evaluation of Glazer and to form an opinion with respect to whether or not he had a psychiatric disorder which was work related (CX 30 at 5). Dr. Mansheim has performed an examination for the shipyard's counsel in this matter on one other occasion in the past year (CX 30 at 5). He met with Glazer for a one-hour interview, which is the standard amount of time that he spends on interviews with workers' compensation patients (CX 30 at 5).

Dr. Mansheim has a number of psychiatric diagnostic tools. He stated that there are five different axes (CX 30 at 6). An axis is an aspect of a psychiatric diagnosis (CX 30 at 6). Axis I is the part of the psychiatric diagnosis that relates to problems that are

characterized by specific signs and symptoms (CX 30 at 6). As to Axis I, Dr. Mansheim found that Glazer was suffering from major depressive disorder, recurrent and moderate (CX 30 at 7). He made a presumption that the disorder was recurrent based on the fact that Glazer had been treated off and on for depression for several years (CX 30 at 7). He classified Glazer's disorder as moderate, based on his level of functioning (CX 30 at 7). The categories that Dr. Mansheim assigned come from the Diagnostic and Statistical Manual ("DSM") of the American Psychiatric Association (CX 30 at 8). The DSM gives him the criteria for the major depressive disorder, and Dr. Mansheim goes by those criteria (CX 30 at 8-9). The criteria for the "moderate" label are that the person would have significant symptoms and that he would have some functional significance (CX 30 at 9).

Dr. Mansheim gave Glazer the "moderate" label because his symptoms were so obvious: he presents looking depressed and he has an impassive facial glaze (CX 30 at 9). He also has apparent feelings of sadness and of feeling blue (CX 30 at 9). Whether the appropriate label is "mild," "moderate" or "severe" is subjective (CX 30 at 10).

Dr. Mansheim's second diagnosis, that of impulse control disorder, not otherwise specified, is based on Glazer's history of significant impulse behavior that had some functional significance (CX 30 at 10). Impulse control disorder means that the person has a problem with being able to control his impulses (CX 30 at 11). He opined that this problem preceded Glazer's workers' compensation injuries (CX 30 at 11). "Not otherwise specified" means that Glazer does not meet the criteria for any specific control disorder (CX 30 at 11-12).

Axis II relates to psychiatric disorders that are characterized by personality features (i.e., "bad habits") as opposed to psychiatric disorders that are characterized by specific signs and symptoms (CX 30 at 12). According to Dr. Mansheim, axis II relates to a personality disorder not otherwise specified with dependent features (CX 30 at 12). Dr. Mansheim believes that Glazer is an individual who has very strong dependency needs, and he acts these out. Dr. Mansheim contends that Glazer acted them out in the context of his orthopedic disorder (CX 30 at 13). He believes that Glazer's knee injuries have been a focus for his dependency need and that his most significant psychiatric problem seems to have occurred after he stopped getting any sort of compensation (CX 30 at 13). Accordingly to Dr. Mansheim, Glazer's dependency existed before his work injuries occurred (CX 30 at 13).

Dr. Mansheim relies heavily on Employer's labor market survey, which, he believes, indicates that Glazer is employable but has chosen not to be employed (CX 30 at 13). He based his opinion about Glazer's employment efforts on the evaluation by Mr. Karmolinski, who outlined a number of potential positions (CX 30 at 14). His opinion would probably change if he was aware that Glazer had applied for those positions and had not obtained them (CX 30 at 14). Dr. Mansheim knows that Glazer is embarrassed because the only money coming in for the family is what his wife is making from baby sitting (CX 30 at 15). Dr. Mansheim places a great deal of weight on Karmolinski's labor market survey (CX 30 at 16).

Axis III relates to medical problems (CX 30 at 16). Dr. Mansheim deferred to the general medical evaluation because other experts are better qualified than he to comment on Glazer's knee problem (CX 30 at 16). Dr. Mansheim agreed that he must have this medical information in order to have a complete picture of the patient and to know with whom he should be consulting about the treatment (CX 30 at 17). Glazer's stomach problems are not relevant to his diagnosis (CX 30 at 18). Dr. Mansheim opined that Glazer's most graphic symptoms were apparent after his benefits were terminated, but Dr. Mansheim agreed that Glazer had symptoms of depression long before that (CX 30 at 18-21). In October, 1996, Glazer's psychiatric condition was progressing (CX 30 at 21).

Axis IV involves psychosocial issues, including marital and occupational problems (CX 30 at 21). Glazer has such problems (CX 30 at 21). Dr. Mansheim did not attribute any cause to Glazer's unemployment (CX 30 at 21). Glazer's whole family history and his daughter's problems are "worth alluding to at least" (CX 30 at 22). Dr. Mansheim concurred that Glazer has chronic pain, which is relevant to a diagnosis (CX 30 at 22-3). Dr. Mansheim did not factor in Glazer's pain separately from his orthopedic condition (CX 30 at 23). He deferred altogether to others on the knee condition (CX 30 at 23).

Axis V is current global assessment of functioning (CX 30 at 23). The assessment is on a scale of from 1 to 100, 100 being perfect functioning (CX 30 at 23). Glazer is at an 80 (CX 30 at 24). If symptoms are present, they are transient and expectable reactions to psychosocial stresses (CX 30 at 24). The assessment number is subjective (CX 30 at 25). Glazer's highest global assessment of functioning in the past year is an 80 (CX 30 at 25). His lowest assessment would have had to be 30 or less because he was psychiatrically hospitalized (CX 30 at 25). Dr. Mansheim agreed that Glazer was appropriately placed in a hospital (CX 30 at 26). He testified that Glazer is on a roller coaster; his assessment was 80 when Dr. Mansheim interviewed him, but he may be at 50 in the next month (CX 30 at 26). Dr. Mansheim believes that Glazer is employable at 80 (CX 30 at 27). If Glazer took a job making substantially less money than before, whether Glazer's psychiatric state would improve depends on whether he had further psychiatric treatment to improve his outlook (CX 30 at 27-8). Glazer can draw negative conclusions from not getting employed (CX 30 at 29).

Dr. Mansheim knows Dr. Gingras and believes that he has a reputation as a competent psychiatrist (CX 30 at 30). He could not criticize Dr. Gingras' diagnosis because he does not know what information Dr. Gingras had when he made his diagnosis (CX 30 at 32).

D. Dr. Triesmann's Medical Records

On January 18, 1990, Glazer suffered a work injury to his left knee while employed by the shipyard. On May 21, 1990, he underwent surgery as a result of that injury. In August of 1991, Glazer underwent additional surgery to his left knee. On December 17, 1991, Glazer underwent surgery to manipulate his left knee as well as an arthroscopic

examination and removal of the screw in the left knee (CX 5 at 32). On June 21, 1993, Glazer sustained an injury to his right knee and, on September 12, 1993, underwent surgery to both of his knees (CX 5 at 21). In February of 1994, Glazer slipped on an icy surface at work and sustained a right knee sprain (CX 6 at 1). On April 14, 1994, Dr. H.W. Triesmann, Jr. opined that Glazer had reached maximum medical improvement and assigned him a 5% partial permanent impairment to his right knee. He noted that, in July of 1992, he had recommended an increase in the disability rating on the left knee to 45%. He stated that this remained an appropriate assignment for that knee (CX 5 at 18).

On May 4, 1994, Glazer was injured at work while sitting in a chair, when a heavy metal beam weighing 100-200 pounds fell across his flexed right knee (CX 6 at 1). On September 12, 1996, Glazer underwent an additional operation on his left knee. Dr. Triesmann allowed him to return to work on light duty as of December 9, 1996 (CX 5 at 10). On January 8, 1997, Glazer suffered another injury at work when his left knee gave way while he was walking (CX 1 at 3). He was again referred to Dr. Triesmann for treatment (CX 1 at 3).

On February 25, 1997, Dr. Triesmann completed a work restriction evaluation form on which he listed Glazer's permanent restrictions, limiting his walking and lifting to one hour per day and his lifting to 20 pounds carried for 50 feet (CX 5 at 44). He also limited Glazer's bending, twisting and standing to one hour per day. Dr. Triesmann restricted Glazer to no squatting and no kneeling (CX 5 at 44). He noted that Glazer should avoid cold and damp conditions and that he should work only inside doing table work or small shop work (CX 5 at 44). On August 12, 1997, Dr. Triesmann completed a physical abilities form, again providing for permanent restrictions due to the condition of Glazer's knees. On that form, he again restricted Glazer's lifting to 20 pounds for a maximum distance of 50 feet. He warned that Glazer should do no climbing of vertical ladders or inclined ladders and should climb stairs only to and from the job site (CX 5 at 3). Dr. Triesmann also ordered that Glazer should only bend stand or twist occasionally, meaning one to two and a half hours per day (CX 5 at 3). Dr. Triesmann added an additional restriction against working outside in cold and damp conditions and limited Glazer to inside table work (CX 5 at 3).

Glazer suffered a new injury to his right knee on January 8, 1997 (CX 5 at 1 and CX 5 at 8). Dr. Triesmann opined that this new injury resulted in a disability until February 25, 1997, at which time the injury resolved and Glazer returned to his January 7, 1997 state of health with regard to his right knee. In July of 1994, because Glazer was depressed, Dr. Triesmann prescribed Elavil. He also had information that, due to Glazer's depression, Dr. Steven Moore, Glazer's family physician, had prescribed Paxil for him in August of 1994 and Prozac in May of 1996. Dr. Triesmann opined that, to a reasonable degree of certainty, Glazer's depression is a direct result of the knee injury that he suffered while employed by the shipyard and the subsequent treatment he received for those injuries (CX 5 at 1). It was his opinion that Glazer needed psychiatric care for his work-related depression (CX 5 at 1).

E. Testimony of Sandra M. Delano

Sandra Delano, a rehabilitation counselor, has a bachelor's degree in speech pathology and audiology with a minor in psychology and a master's degree in counseling (Tr. 111). Delano has been self employed for a year; before that she worked for Crawford and Company and then Associated Rehabilitation Consultants until September 1997 (Tr. 111). She has been Office of Workers' Compensation Programs (OWCP) certified for almost three years and has a certified rehabilitation counselor certification (Tr. 112).

In September, 1997, Delano was retained by OWCP in Glazer's case (Tr. 112). Her first assignment was to obtain some background information and perform some vocational testing (Tr. 113). The tests included the Wide Range Achievement Test, the Revised BETA, second edition and two inventories - the temperament and values inventory and the interest determination, exploration, and assessment system (Tr. 114). In the Wide Range Achievement test, Glazer scored at the high-school level in spelling, post-high school level in reading, and the sixth-grade level in arithmetic (Tr. 115). In the BETA test, he was found to be functioning at the 37th percentile, and his BETA IQ was 95 - in the "average" range (Tr. 115). In the interest, temperament, and values inventory, Glazer indicated a preference for set routines and a tendency to take life very seriously; he liked defined schedules and less vigorous activities and preferred to be alone or with a small group of friends (Tr. 116). Some potential positions identified from the test were mechanic, laboratory technician, driving instructor, and teacher's aide (Tr. 116).

After administering the tests, Delano targeted some potential jobs for Glazer and worked to try to get him back to the shipyard (Tr. 116-7). Delano also targeted other positions. She hoped that she might find something in the welding field (Tr. 117; CX 27). After about four months of working with Glazier, Delano considered having him retrained in computers (Tr. 118), but she also observed that Glazer's emotional status was beginning to deteriorate (Tr. 119). His affect became very flat, and he did not seem interested in anything (Tr. 119). He felt betrayed by the shipyard (Tr. 119). In eight years, she has never seen anyone try as earnestly to return to the shipyard as Glazer did (Tr. 120; see CX 9 at 1).

Glazer contacted many employers outside the shipyard in his search for work (Tr. 120). He targeted welding, but there were not many jobs for welders with Glazer's restrictions (Tr. 120). Delano researched the internet; went to the VEC and job fairs; and sent his resume to employers (Tr. 120). Because of the change in Glazer's emotional status, Delano recommended closing his file (Tr. 121). She did not believe that he would be successful until his condition stabilized by psychiatric treatment (Tr. 121). Delano believes that Glazer made a good-faith effort to find employment outside the shipyard (Tr. 123).

On cross examination, Delano acknowledged that she has placed only a few people in sedentary jobs during the last year (Tr. 130). She has placed some people in a security job at Digital Security, but the job was not sedentary (Tr. 131-3). She also submitted Glazer's resume to Colonial Williamsburg for a greeter position, to Next Generation Network for an advertising position, to Cooper Automotive for some bench work and Powhatan Plantation for a guest service position (Tr. 133). She did not believe that it was

in Glazer's best interest to place him in a cashier's position at a restaurant (Tr. 134). She was considering entry-level jobs (Tr. 135). Around April, 1998, Delano stopped looking for career jobs and focused on entry-level positions (Tr. 136). In the month before Glazer's file was closed, Delano submitted resumes on Glazer's behalf for four entry-level positions (Tr. 138). Delano did not accompany Glazer to any interviews (Tr. 139). She accompanies about 35% of the workers she works with to interviews (Tr. 140).

In February, 1998, Delano first noticed that Glazer was exhibiting signs of depression (Tr. 142). Delano does not do any consulting for Glazer's attorney or his firms (Tr. 142). In March and April, 1998, Delano started to think that Glazer was not employable (Tr. 144). She did not think that Glazer was ready for work. She believed that he needed to get some things straightened out or he would not be able to focus on work (Tr. 147).

Delano opined that a person's employability would be diminished as a result of being susceptible to panic attacks (Tr. 150).

E. Testimony of David Karmolinski

David Karmolinski testified that he is a vocational consultant for Resource Opportunities, Inc ("ROI"), where he has worked for two years (Tr. 155). Previously, he worked for Wright Choices as a job coach (Tr. 155). Prior to that he worked for three and a half years at the Pines Residential Institute with adolescents and young adults with psychosexual problems (Tr. 155). He has a BA in speech communications and a BS in psychology (Tr. 155). As part of his current job, Karmolinski does labor market surveys to try to identify jobs that are within a worker's vocational abilities and restrictions (Tr. 156).

Karmolinski testified that he obtained Glazer's shipyard application and looked at the local labor markets trying to find positions that were within his restrictions (Tr. 157). He stated that he had made a mistake in describing Glazer's math level and confirmed that Delano's evaluation is correct (Tr. 158). Karmolinski testified as to several of Glazer's attributes; he advised that Glazer has a solid work background, that he has worked for 20 years in a specific position, and that he has worked as a cashier (Tr. 158).

Karmolinski described several jobs that he believed to be appropriate for Glazer. He described entry-level jobs at Issues and Answers in Virginia Beach and a Associated Cabs (Tr. 158-9). At a job interview at Goodwill, Glazer had poor eye contact and did not emphasize his positives (Tr. 159-60). Karmolinski also testified that he spoke with Denbigh Toyota, Marriott Hotel, Brandywine Woodcrafts, Conforma Labs, QVC, Morrison's Cafeteria, Chanello's Pizza and Disabled American Veterans; all advised that Glazer would be a viable candidate for an entry-level job (Tr. 161-2). At the Disabled American Veterans interview, Glazer was told that the position was fast paced (Tr. 163). Glazer advised them of his medication and that he cannot work in a fast-paced environment (Tr. 163). The job involved calling people at home and asking for donations (Tr. 164).

Karmolinski testified that Glazer seems disassociated at times when Karmolinski picks him up for an interview and that he has poor eye contact during his interviews (Tr. 164). Clemons Security advised Glazer that he would not be considered because of his medications and his work restrictions (Tr. 165). Karmolinski was not sure whether Clemons Security would hire Glazer because he listed two charges on his application (Tr. 166). Karmolinski also spoke with Picadilly's Cafeteria and Johns Brothers Security (Tr. 166). Karmolinski stated that Glazer never advised him that he had a criminal background (Tr. 167).

Karmolinski has taken Glazer to Pro Temps twice (Tr. 168). Representatives of Pro Temps have twice told him that they might have a job for Glazer, but Karmolinski has been unable to contact them (Tr. 168-9). Glazer told Karmolinski that, because of his medication and because he often feels confused, he was not sure that he could handle the job (Tr. 169). Karmolinski does not believe that Glazer was diligent in trying to find work (Tr. 169). The employers to whom Karmolinski talked have trouble finding people who will work for low wages (Tr. 173).

Karmolinski opined that Glazer has a wage-earning capacity of \$228.00 per week (Tr. 173).

On cross-examination, Karmolinski admitted that he had sent Glazer a letter dated July 17, 1998 outlining a number of job descriptions (Tr. 177). Karmolinski also submitted the same job descriptions to Dr. Triesmann (Tr. 177), who disapproved five of the six positions (Tr. 178; CX 28-1-7). Karmolinski received the doctor's disapproval on July 22, 1998 (Tr. 178). He did not give this information to counsel for the shipyard (Tr. 179). Karmolinski eliminated some of the jobs that Dr. Triesmann disapproved and added some jobs (Tr. 179, 181). Karmolinski did not take all of the jobs that Dr. Triesmann disapproved off his labor market survey (Tr. 181).

Karmolinski had not spoken to Dr. Triesmann since Karmolinski had faxed him the job restrictions in August, 1998 (Tr. 182). Karmolinski noted also that Glazer's demeanor in interviews included shaking, trembling hands, shaky voice and excessive sweating (Tr. 185). He does not think that Glazer faked the excessive sweating (Tr. 185).

Karmolinski did not take Glazer's psychological problems into consideration when he submitted the labor market survey of July 13, 1998 (Tr. 187). Karmolinski agreed that Dr. Gingras' opinion that Glazer is markedly limited in his ability to complete a normal workday and week without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods could be a hindrance to obtaining a job (Tr. 189). Karmolinski would have to discuss job availability with each of the employers he described (Tr. 189). He agrees also that Glazer's markedly limited ability to carry out detailed instructions and to maintain attention and concentration for extended periods may hinder his employment (Tr. 189).

Karmolinski could not recall when he spoke to Ms. Lane regarding the Issues and Answers position for Glazer (Tr. 190). He insisted that he had talked to these employers

about Glazer (Tr. 191). He does not know whether Glazer can type 25 words per minute, as is required for the Issues and Answers position (Tr. 192). As to the Associated Cabs job, Karmolinski could not recall when he spoke to Leon Pierce about Glazer (Tr. 193). Karmolinski does not know whether the job involves a great deal of pressure or whether the work there requires the use of computers (Tr. 194). Glazer does not have a background in computers (Tr. 195). Karmolinski advised that he told the prospective employers that Glazer would need to take a break every two hours (Tr. 196). He does not know whether the job at Solo, Inc. and the dispatcher job were available in December, 1996 (Tr. 200). As to the donation center jobs, Karmolinski agreed that they are performed in uninsulated sheds that do not have air conditioning and central heat (Tr. 200). Dr. Triesmann has imposed a restriction against working in cold, damp places (Tr. 200).

Karmolinski testified that he talked with representatives of Denbigh Toyota and Marriott Hotel about Glazer (Tr. 202-3). As to the Toyota dealership position, Karmolinski did not know whether the job is computerized or whether the job was available in December, 1996 (Tr. 202). As to the hotel, Karmolinski does not know how many rooms are there, how many phone calls Glazer would be required to answer per hour or how much pressure is involved (Tr. 203-4). Karmolinski does not know whether the jobs at Brandywine Woodcrafts or Conforma Labs were available in December, 1996 (Tr. 204-5). As to QVC, he did not know whether this job was high pressure or low pressure (Tr. 206). The Morrison's cafeteria job is one that Dr. Triesmann rejected; Karmolinski did not know whether the job was available in December, 1996 (Tr. 207). The Clemons Security job was another one that Dr. Triesmann rejected (Tr. 207), as was the job at Picadilly's Cafeteria (Tr. 209). The job descriptions that Karmolinski had for Chanello's Pizza and for Disabled American Veterans were drafted in 1997 before his meeting with Glazer (Tr. 210-11). Karmolinski mistakenly included positions with Pizza Hut as a delivery driver, with Papa Johns Pizza as a delivery driver and with Jacobson Chesapeake security as an unarmed security guard; Dr. Triesmann rejected those jobs, and Karmolinski withdrew them (Tr. 212-14).

Karmolinski does not know whether he sent Glazer the listing of available jobs with his July 17, 1998 letter to Glazer (Tr. 216-17).

F. Testimony of Neal Windley

Mr. Windley is the director of human resources at Goodwill Industries of Hampton Roads (CX 25 at 4). He has held that position for one year. He testified that Goodwill has a position described as a donations center attendant (CX 25 at 4), who sits in the center of a shed and takes donations from the public from 9:00 am to 5:00 pm every day. Windley described the position as sedentary in that it does not require strenuous exercise. Specifically, it does not require lifting, crawling, climbing or reaching overhead (CX 25 at 5). The job description limits lifting to ten to twenty pounds (CX 25 at 5).

Windley stated that the attendant works alone all the time (CX 25 at 6). The attendant is expected to help donors when they bring items, including pieces of furniture, to the shed (CX 25 at 7). Photographs of the donation center are found at CX 26.

DISCUSSION

A. Suitable Alternative Employment

Employer concedes that Claimant has met his burden of making a prima facie case of total disability by establishing that he is unable to return to his pre-employment work (Tr. 25). Once Claimant has established a prima facie case, the burden shifts to the employer to demonstrate the availability of suitable alternative employment. Newport News Shipbuilding and Dry Dock Co. v. Tann, 841 F. 2d 540, 542 (4th Cir. 1988). The employer must establish the actual availability of specific and realistic job opportunities in the claimant's geographic area and within the claimant's restrictions which the claimant could secure if he diligently tried. Trans-State Dredging Co. v. Benefits Review Board (Tarner), 731 F. 2d 199 (4th Cir. 1984).

Through the testimony and labor market survey of David Karmolinski (EX 21), Employer has identified 17 jobs which it considered "vocationally appropriate" for Claimant in that the jobs were available and within his work restrictions (EX 21). Further, Employer contends that, despite the fact that Dr. Triesmann initially rejected some of these jobs as being unsuitable, he ultimately approved all of them thanks to Mr. Karmolinski's persistence (EX 35, 36). Mr. Karmolinski even argued that the jobs were within Dr. Gingras' restrictions (EX 37).

However, I find that Employer has not proven that any of these jobs were suitable for Claimant. Specifically, the record contains insufficient that, from a psychiatric standpoint, Claimant could perform any of the identified jobs. Much less does it show that he would likely be hired for them. Dr. Mansheim, Employer's examining physician, acknowledged that Claimant suffers from "impulse control disorder" (CX 30 at 10), which indicates that he suffers from periodic episodes in which he is unable to control his impulses. Likewise, Dr. Mansheim acknowledged that Claimant suffered from depression and demonstrated symptoms thereof before his workers' compensation had been cut off (Id. at 18-21).

Dr. Gingras was more specific about Claimant's psychological and psychiatric problems: he testified that Glazer would have to work in a "predictable environment" (CX 29 at 38). This environment would have to be structured and organized (Id. at 39). If an employer is not flexible, Claimant would have a difficult time adjusting at certain times (Id. at 46). If Glazer were placed in a position where he would have to deal with rude or

difficult customers, he would be likely to “overreact” to such a situation (Id. at 47). Alarming, if Claimant were being admonished by his boss, he would likely go into a state of panic (Id. at 47). Dr. Gingras’ opinions on those subjects were not contradicted.

The record does not show that any of the prospective 17 employers would hire a person with the psychological problems that Claimant’s psychiatric profile shows. It is clear that Karmolinski never told any of the prospective employers about Claimant’s psychological problems (Tr. 187) and, thus, I have no basis on which to conclude that any of these prospective employers would have hired him or that he could have successfully performed these jobs over a long period of time.

It is important to note that Drs. Gingras and Mansheim, the two opining psychiatrists, do not significantly disagree as to Claimant’s ailments and disabilities. They both agree that he has an impulse control disorder or “adjustment disorder” (CX 29 at 9, 39, 47; CX 30 at 10) and depression (CX 30 at 18-21; CX 29 at 9).

What caused Claimant’s depression and impulse control disorder is not important. Employer spends much space arguing that the cutoff of workers’ compensation benefits was the cause (Employer’s brief at 38). However, it is well settled law that an employer takes a worker as it finds him. Crum v. General Adjustment Bureau, 738 F. 2d 474, 479 (D.C. Cir. 1984). Thus, whether Claimant’s depression was caused by his injuries, by his cutoff of worker’s compensation, by something entirely different, or by a combination of things is beside the point. However, as stated, Dr. Mansheim agreed that Claimant’s depression had manifested symptoms prior to the cutoff of worker’s compensation (CX 30 at 18-21).

The key point is that Karmolinski did not consider Dr. Gingras’ opinion in reaching his conclusion as to the suitability of the 17 identified jobs (Tr. 187). Necessarily, he did not inform prospective employers of Claimant’s psychiatric problems when he contacted them (Id.).

Under the rule in Turner, supra, an employer seeking to prove the existence of suitable alternative employment is not necessarily required to contact a prospective employer for the worker. However, in a case like this, where a worker has special problems, particularly problems of a psychiatric nature, I believe that such a contact would be highly desirable if not necessary. Failing such contacts, a vocational expert would have great difficulty in establishing the suitability of a prospective job. Karmolinski’s efforts are an example of this difficulty. Appreciating the obvious gap in its proof, Employer had Karmolinski contact a number of prospective Employer’s after the hearing. In a letter to Employer’s counsel (EX 37), Karmolinski cited four jobs as being “low stress” and the rest as having “some periods of mild stress.” Karmolinski opined that Claimant could perform these jobs. However, this still does not answer the question whether these employers would hire a person subject to depression and impulse control disorder with their attendant symptoms.

For example, would they be willing to hire a man who experiences panic attacks when criticized by his boss (CX 29 at 9, 47); who overreacts to rude customers (Id.); who has trouble concentrating for a long period (CX 29 at 19); who has difficulty completing a normal workday without interruptions (CX 29 at 20); and who is “markedly limited” in his ability to carry out detailed instructions (CX 29 at 19)? The record imparts no clue as to whether any prospective employer could accommodate a person with these serious problems or would try to do so. This omission is fatal to Employer’s case.

For this reason, I find that Employer has not satisfied its burden of demonstrating the existence of suitable alternative employment. Thus, I need not reach the question of whether any of the identified jobs are suitable from the point of view of Claimant’s physical disabilities. Likewise, I need not and do not reach the question of whether Claimant diligently sought employment but was unable to secure it.

B. Medical Benefits

As stated, Claimant seeks reimbursement for his psychiatric treatment by Dr. Gingras. Employer resists this claim on the grounds that Claimant’s psychiatric problems were not work related.

Claimant may use the presumption in section 20(a) of the act to aid him. Section 20(a) provides that, “In any proceeding for enforcement of a claim for compensation under this act, it shall be presumed, in the absence of substantial evidence to the contrary - (a) that the claim comes within the provisions of the act....” In order to obtain the benefit of this presumption, Claimant must establish that he suffered some harm or pain and that an accident occurred or that working conditions existed that could have caused the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981). Employer has stipulated that Claimant suffered an on-the-job injury. Indeed, Employer has stipulated that Claimant suffered no fewer than four such injuries (JX 1 at paragraphs 3-6). Further, Dr. Trieshmann has opined, to a reasonable degree of medical certainty, that Glazer’s depression is a direct result of his knee injuries suffered while employed by the shipyard and the subsequent treatment for these injuries (CX 5 at 1). Dr. Gingras also testified that Glazer’s psychological problems are related to his work injuries (CX 29 at 34). Hence, Claimant has successfully invoked the section 20(a) presumption.

That being the case, the burden shifts to Employer to go forward with countervailing evidence to rebut the presumption that Claimant’s psychological difficulties were caused by Claimant’s on-the-job injuries. Swinton v. J. Frank Kelly, 554 F. 2d 1075 (D.C. Cir.), cert. den’d 429 US 820 (1976). Here, Employer has adduced countervailing evidence in the form of testimony of Dr. Mansheim that Claimant’s depression is “not appropriately conceptualized as secondary to a work related injury” (EX 26 at 26; CX 30 at 36). I find that this substantially rebuts the presumption, which then falls out of the case, and the

burden of proof returns to Claimant. Travelers' Insurance Co. v. Belair, 412 F. 2d 297 (1st Cir. 1969).

For the following reasons, even without aid of the presumption, I find that Claimant has sustained his burden of demonstrating causation:

1) Both Dr. Triesmann and Dr. Gingras were Glazer's treating physicians, and, hence, had ample opportunities to observe him, whereas Dr. Mansheim examined him only once for an hour (CX 30 at 5).

2) Dr. Mansheim never categorically stated that Claimant's injuries played absolutely no role in his depression or impulse control disorder. Instead, he merely noted that the "major determinate" to Mr. Glazer's condition "appears to be" the cutoff of worker's compensation (EX 26 at 26). He further stated that, in his opinion, Glazer's depression is "not appropriately conceptualized as secondary to a work related injury" (Id.). These statements are less than categorical severings of the causation chain in that they do not rule out Claimant's injuries as contributing causal factors.

3). Finally, Claimant would not have been receiving workers' compensation at all in the first place had it not been for his injuries. Therefore, even under Employer's contention, the subsequent cutoff by Employer of Claimant's worker's compensation is causally related (in the sense of but-for causation) to the injuries.

Employer argues that Claimant was never psychiatrically disabled. Dr. Mansheim rated Glazer at 80 (essentially normal) on a DSM IV classification scale of 1-100, whereas Dr. Gingras rated him 61 (continuous interference in functioning under demands and stress) (CX 29 at 31-2). I credit Dr. Gingras over Dr. Mansheim and find that Claimant has a psychiatric disability. I do so on the grounds that Dr. Gingras, Claimant's treating physician, who testified that Claimant does have such a disability (CX 29 at 32), deserves more weight as treating physician for the reasons stated above.

Next, Employer argues that, even if disability and causation are shown, subsection 7(d)(2) of the act forecloses compensation for Claimant's psychiatrist's bills. Subsection 7(d)(2) contains a notice-of-treatment requirement within ten days following the date of a doctor's first treatment. The burden of proof is on Claimant to show that section 7 has been complied with. Maryland Shipbuilding and Dry Dock Co. v. Jenkins, 594 F. 2d 404 (4th Cir. 1979). Here the record contains no evidence that Dr. Gingras filed medical reports within ten days as required.

There is an exception to the ten-day notice rule for when notice was not given because treatment was provided on an emergency basis. 20 CFR 702.405. However, there is no evidence of an emergency here.

The Department of Labor has the discretion to excuse failure to file a timely notice of treatment when it would be in the interest of justice to do so. 33 USC 907 (d)(2); Armfield v. Shell Offshore, Inc., 25 BRBS 303, 309 (1972). However, only the District Director has the authority to do so, and I do not. Kroehn v. Ingalls Shipbuilding, Inc., 29 BRBS 72 (1994).⁵

For the above-stated reasons, I must deny Claimant's claim for medical benefits.

C. Section 8(f) Relief

Section 8(f) of the act serves to limit the amount of benefits that an employer must pay an employee when an injury suffered by the employee was preceded by a permanent partial disability. When an employee is permanently and totally disabled, as is the case here, his employer must establish three prerequisites to be entitled to relief under section 8(f): (1) that the claimant had a preexisting permanent partial disability; (2) that the preexisting disability was manifest to the employer; and (3) that the ultimate permanent total disability of the claimant is not due solely to his latest work-related injury. 33 U.S.C. 908(f); Director, OWCP v. Newport News Shipbuilding & Dry Dock Co. (Harcum I), 8 F.3d 175, 185 (4th Cir, 1993), aff'd on other grounds, 514 U.S. 22 (1995). The Employer bears the burden of proof in establishing these three elements. Director, OWCP v. Newport News Shipbuilding and Dry Dock Co. (Barcliff), 737 F. 2d 1295, 1298 n.2 (4th Cir 1984).

Employer filed no brief containing an argument concerning section 8(f) relief. The Director filed a brief vigorously opposing Employer's claim. I will proceed to inquire as to Employer's satisfaction of the above three prerequisites.

1. Pre-existing disability

A pre-existing permanent partial disability exists where the employee had such a serious physical disability that an employer would have been motivated to discharge the handicapped employee because of a greatly increased risk of an employment-related accident and compensation liability. C&P Tel. Co. v. Director, OWCP (Glover), 564 F. 2d 503 (D.C. Cir. 1997). The Director does not seriously dispute Dr. James Reid's contention that any and all of the prior disabling knee injuries constituted pre-existing permanent partial disabilities within the meaning of the act (EX 12). I so find.

⁵ Neither the statute nor the regulation imposes a deadline on obtaining this excuse. Therefore, it may not even now be too late to do so.

2. Manifestation

A pre-existing impairment is manifest to an employer if it knew or should have discovered the impairment prior to the second injury. Lowry v. Williamette Iron and Steel Co., 11 BRBS 372 (1979). I have no reason to doubt that the shipyard had knowledge of all of Claimant's prior injuries from its own records (EX 12). As the Director does not argue to the contrary, I find that Employer has satisfied the manifestation requirement.

3. Contribution

As stated, to establish entitlement to section 8(f) relief, when an employee is permanently and totally disabled, the employer must establish that the employee's ultimate permanent total disability is not due solely to the work-related injury. Harcum I, supra, 8 F.3d at 185.

Here, Employer has proffered the statement of Dr. Reid, its in-house physician, as the only medical opinion evidence on the issue of contribution (EX 12). In this case, the contribution issue is complex because Claimant suffered so many knee injuries both before and after he began work at the shipyard. Indeed, the record shows that Claimant suffered four knee injuries after his employment at the shipyard (JX 1 at paragraphs 3-6). Further, Dr. Reid's letter and attached exhibits document a significant knee disability as a result of a 1971 injury that occurred prior to his employment by the shipyard (EX 12, exhibits 1,2).

Section 8(f) requires that Employer prove that the ultimate permanent total disability is "not due solely to the work related injury," Harcum I, supra, 8 F. 3d at 185. As stated, in this case there are at least four documented work related knee injuries, of which two (1990 and 1997) affected the left knee (JX 1 at paragraphs 3 and 6). Dr. Reid's letter (EX 12) relates only to the 1990 injury and does not even mention the 1997 knee injury, which was the last job-related injury to Claimant's left knee. Dr. Reid has made a convincing case (aided by his substantial documentation in the form of exhibits to his letter) that Claimant's ultimate permanent total disability is "not due solely to" the 1990 left knee injury (Id.). However, despite my strong suspicions that the same conclusion would obtain as to the 1997 knee injury, I, a layperson, cannot make this finding unaided. As the Director points out, under Harcum I, the key injury for purposes of section 8(f) analysis is the last work-related injury that contributed to Claimant's whole-body permanent disability.⁶ I find

⁶ Unlike the present case, neither Harcum case involved multiple on-the-job injuries. Thus, in neither Harcum case did the court specifically address the question of which injury must be compared to the "ultimate" disability. However, the concept of "ultimate disability" necessarily includes the latest disabling injury. Thus, any comparison must at least include the last disabling injury as part of the

no medical opinion evidence, either documented or undocumented, that supports the conclusion that the 1997 injury was not the sole cause of Claimant's ultimate permanent total disability.

In other words, from the evidence of record, I cannot make a finding that Employer has proven by a preponderance of the evidence that the 1997 injury to Claimant's left knee was not the sole cause of Claimant's permanent total orthopedic disability. Claimant's section 8(f) application concerning the 1997 injury (EX 15) contains no information that would help me make a finding that Employer had satisfied the Harcum I test for cases of permanent total disability.⁷

For the reasons stated above, I must deny Employer's claim for relief pursuant to section 8(f) of the act.

ORDER

It is hereby ORDERED as follows:

1. Employer shall pay Claimant permanent total disability compensation for the period April 9, 1997 to the present and continuing at the rate of \$367.77 per week.
2. Claimant's claim for medical benefits pursuant to section 7 of the act is hereby DENIED.
3. Employer's claim for partial relief pursuant to section 8(f) of the act is hereby DENIED.

FLETCHER E. CAMPBELL, JR.

worker's ultimate disability. Dr. Reid's analysis did not consider the 1997 injury either alone or as part of Claimant's ultimate disability.

⁷ If I had found that Claimant was permanently and partially disabled rather than permanently and totally disabled, I would still have to find that Employer had not satisfied the Harcum tests for partial relief as concerns a partially disabled claimant. This is because, under Harcum I and II, Employer must quantify the contribution of the "level of impairment that would ensue from the work related injury alone." Harcum I at 185; Newport News Shipbuilding and Dry Dock Company v. Director, OWCP (Harcum II), 131 F. 3d 1079 (4th Cir. 1997). The record contains no evidence of any such quantification.

Administrative Law Judge

FEC/lpr
Newport News, Virginia